AUTHORITY AND ADJUDICATION IN MODERN LEGAL THEORY

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The central problem of jurisprudence is that of explaining the possibility and the nature of legal authority. A secondary problem for jurisprudence is the question of what makes for good judicial decision-making. Although the two problems are different, they can be seen, certainly in modern legal theory, to overlap. That is, there came a point in the twentieth century when legal theorists began to argue fairly regularly that the validity of legal systems depends significantly upon, among other things, adjudicative criteria and principles. This course begins with an examination of legal positivism – the classic modern account of what makes law bind – and then proceeds to consider a series of theoretical perspectives on adjudication with the intention of demonstrating that these perspectives help us to understand the nature of legal authority. Although the course is intended as a basic introduction to some core issues of legal theory, it is hoped that it will also provide students with insights into some of the problems encountered in other parts of the law school curriculum and introduce them to arguments and literature which they might draw upon when completing assignments and examinations in other courses.

Evaluation: Students will be required to write a 10-12 page research paper, which will be graded on an Honours/Pass/Fail basis. Papers must be delivered to the Records Office by 4:00 p.m. three weeks after the end of the course. (A date for submission will be assigned once the course has been scheduled.)

Class 1

The Pure Theory of Law

Readings:

Hans Kelsen, 'The Concept of the Legal Order' (1982) 27 *American Jnl of Jurispridence* 64-84.

Hans Kelsen, 'On the Pure Theory of Law' (1966) 1 *Israel L. Rev.* 1-7.

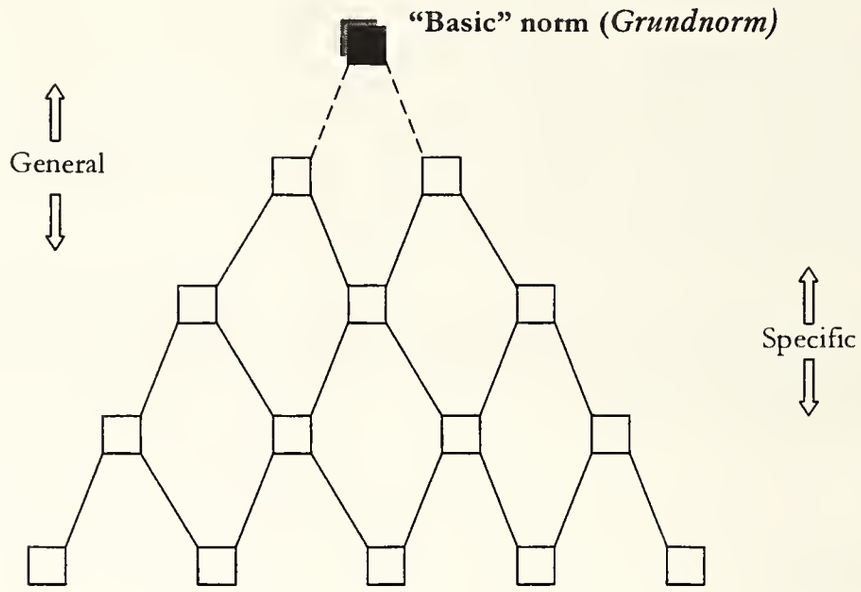
The first of these readings was first published in 1958 and the time lapse between the two articles is significant. Kelsen – the originator of the so-called Pure Theory of Law – entered into a so-called "sceptical phase" around 1960 (he died in 1973), during which period he radically revised his so-called *Grundnorm* or Basic Norm. The sceptical Kelsen – with his revised Basic Norm – you will find in the *Israel Law Review* article. But I'm jumping ahead of myself. Before reading these articles, you might appreciate a brief introduction to Kelsen and his theory. Well, here goes …

Kelsen was a hard-line legal scientist. In good positivist fashion, he believed both that law is created (posited) by human beings and that the validity of laws is something independent of their moral content. By starting with Kelsen, I'm throwing you in at the deep-

end. Jurisprudence doesn't come much more abstract, more complex - some would say more *boring* - than Hans Kelsen's Pure Theory of Law. In essence, Kelsen wanted to present law as a science and the way in which he does this is represented by Figure 1 (below). I think that Kelsen's legal philosophy is fascinating and I'll endeavour to show you why. The main issues to think about with Kelsen are the following. Why was he so hung up on treating law as a science? What, after all, is the point of doing this? What's the basic norm? Does it work (that is, does it work for Kelsen's purposes)? If it doesn't, does the Pure Theory of Law fail?

I'll suggest that Kelsen's theory can be seen - that he himself appeared to regard it - as a failure. But I'll also argue that we can learn some interesting things from this particular failure.

Figure 1: Kelsen's Pure Theory of Law



Class 2

The Legal Positivism of H.L.A. Hart

Reading:

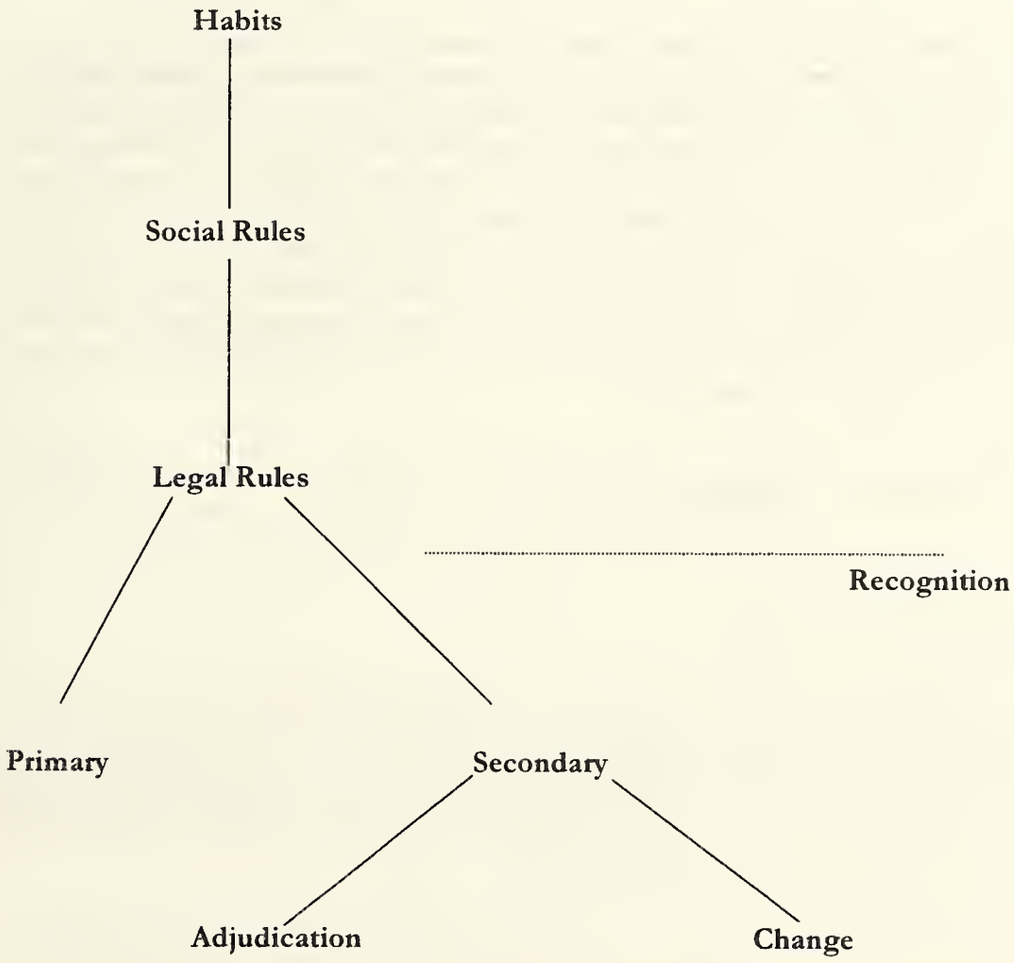
H.L.A. Hart, *The Concept of Law* (2nd edn, Oxford: Clarendon Press, 1994), pp.79-123.

There's a similar outlook to be found in the works of Kelsen and Hart. But unlike Kelsen, Hart is not hung up on science. And Hart believed that morality must play some part in establishing legal validity.

With Hart, the point which I really want you to think about is the so-called 'rule of recognition.' It would be easy, but not quite correct, to say that the rule of recognition is to Hart's theory what the basic norm is to Kelsen's. I think the best way to look at the rule of

recognition is to think of it as akin to rules of a game. If you're playing a game you have to play by the rules, otherwise it just isn't cricket, chess or whatever. People who operate the legal system, if you think about it, are also involved in a game - law is like a game, we might say - and if those people don't abide by the rules (i.e., abide by legal procedures and conventions) then the game breaks down. The rule of recognition is just this: the rule that legal officials must recognise that there exist common binding legal standards - rules of the game, if you like - which those officials must abide by if the legal system is to maintain its validity.

Figure 2: H.L.A. Hart's *The Concept of Law*



Class 3

Legal Formalism

Readings:

Neil Duxbury, *Patterns of American Jurisprudence* (Oxford UP, 1995), ch. 1.

Harvard Celebration Speeches, 3 LAW Q. REV. 123 (1887).

For the purposes of this class, 'legal formalism' means formalist legal thought in late-nineteenth century America. Formalism is partly (not wholly, I will show you) to do with the developments in legal education at the Harvard Law School in the 1870s. So that you might get an initial grasp of the idea of formalism, I'd like you to read a couple of short speeches by Oliver Wendell Holmes, Jr. and Christopher Columbus Langdell. The speeches are collected together and published as *Harvard Celebration Speeches*, 3 LAW Q. REV. 123 (1887). What Langdell has to say in his speech is fairly predictable; Holmes less so. Once we've talked about these speeches I want to move on to another dimension of legal formalism, what I'll call legal formalism in the US Supreme Court. Legal formalism in this sense is really a philosophy which many realists identified with the classic late-nineteenth and early-twentieth century 'liberty of contract' cases:

Allgeyer v. *Louisiana* 165 U.S. 578 (1897).

Lochner v. *New York* 198 U.S. 45 (1905).

Coppage v. *Kansas* 236 U.S. 1 (1915).

I don't actually think it's right to claim that the philosophy which American legal realists found in these cases is one which the Supreme Court subscribed to – that claim just seems simplistic – but the fact is that realist jurisprudence did find a specific philosophy in the liberty of contract cases. And we need to find out what that philosophy was, what was formalist about it, and why the realists didn't like it.

Class 4

American Legal Realism

Readings:

Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910).

Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923).

Legal realism was first and foremost a sense of dissatisfaction – a belief that formalism didn't tell it as it really is. 'It' being law; but not just law. The realists felt that formalism got society and the economy wrong as well. To get a sense of how the realists were dissatisfied, I want you to read the article by Pound, a great American jurist who effectively prophesied realist jurisprudence (even if he purported to have no time for this jurisprudence once it was established). Pound can be a bit formidable: he cites German jurists that I've never heard of, let alone read. But if you refuse to be intimidated by him and just read then I think you will find his arguments – perhaps that should be his gripes – clear enough.

Pound doesn't really say very much in this article about the liberty of contract cases, though he did elsewhere.[1] To understand the realist reaction to legal formalism in the courts, you should read Hale's article. There are quite a few layers to Hale's study, but basically he wants to show you that there's something essentially oxymoronic about the idea of liberty of contract. We'll figure out why. We'll also try to figure out whether he's right.

Class 5

Post-War thoughts about reason

Readings:

Edward A. Purcell, Jr., *American Jurisprudence between the Wars: Legal Realism and the Crisis of Democratic Theory*, 75 AM. HIST. REV.424 (1969).

Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949).

By the stage it will be useful to spend some time taking stock of what we've dealt with so far. Post-War American legal thought, I will try to show, had to tackle more than just the lessons of legal realism. Questions about constitutional interpretation loomed large in the United States (nothing new there). And there was also the matter of what had happened in Europe: did those dictatorships have genuine legal systems? It says little for the moral quality of law if they did. But if they didn't, how are we to demonstrate as much?

To address these questions, I want you to read Fuller's article. Fuller sets up a fictional Supreme Court to deal with a hard case, and each of his Justices represents a specific legal philosophy. Although one of his Justices represents his own views more closely than do any of the others, he shows no preference for any one philosophy. I will get you to uncover each of the legal philosophies, and to work out the possible conclusions, that Fuller alludes to in this article.

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[1] *See* Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909).

Class 6

The search for principle

Readings:

Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

Ronald Dworkin, *Political Judges and the Rule of Law*, *in* A MATTER OF PRINCIPLE 9 (Clarendon Press, 1986) (1978).

During the second half of the century, other American legal theorists similarly began to voice concerns about legal power and its limits. At this stage I want to examine the emergence of 'process jurisprudence' – an idea which will be associated with a number of American jurists. I want to show you that process jurisprudence was very much as an exercise in dealing with problems posed by constitutional adjudication – problems which hadn't been handled well during the realist era, but which the process jurists struggled with as well. Wechsler struggled more than most – with judicial review, with *per curiam* opinions, and with *Brown v Board of Education*. As regards *Brown*, even Wechsler wasn't sure what the principle at stake was. But I think his diffidence is a virtue, and that what really matters is his motivation rather than his accomplishment.

I want to show you that American process theorists were arguing that the notion of principle is important because it is the key to ensuring that law is about reason. Why should it be important that law is about reason? For process theorists, there are various answers to this question: the requirement that legal decisions be supported by elaborated reasons is a good way of encouraging transparency, consistency, accountability, seriousness, and restraint in law. It might also ensure that general legal processes are valued more highly than particular legal outcomes – something, as you can imagine, that process theorists consider important – and that there is a credible separation of powers. This last point is dealt with very well in Dworkin's article. Dworkin, as I expect you know, is an eminent American jurisprudence professor who for many years has worked both in the USA and the UK. In this essay, he takes issue with a British law professor, John Griffith (Dworkin wrongly refers to him as Griffiths), who argued that judges inevitably play a political role in modern states. But Dworkin says .... Well, what does he say? That judges don't assume this role? That they shouldn't assume this role? Dworkin, you will see, is making a normative argument, an argument about what judges should do, and in class I will draw upon some of his other writings and try to spell out his argument more fully. But Dworkin would be the first to admit that it is a controversial argument, and we will see that there has been no shortage of criticisms of his theory.

Class 7

Is Reason overvalued?

Readings:

Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995).

Neil Duxbury, *Random Justice* (Oxford UP, 1999), 114-31.

One modern criticism of the process tradition has been not that it was normative, but that it was normative in the wrong way. So far as legal reasoning is concerned, process theorists seem to have been of the view that more equals better. Might it be the case that it is sometimes better for decision-makers to reason less rather than more? Sometimes we do best to keep our mouths shut, Sunstein seems to be arguing, and that it as true of lawyers as of any other group of people. Reasoning up to a point and then stopping is sometimes better than reasoning to the nth degree. When we consider this thesis, I want you also to think about another question: when, if ever, might it be appropriate for legal decision-makers to engage not in minimal but in *no* legal reasoning?